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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1984

JACKIE LEE ATKINS,

PETITIONER

vs.

STATE OF TENNESSEE,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court erred in permitting Tennessee Bureau of Investigation Agent Bowers to read from a report which stated that the defendant refused to take a polygraph test in violation of defendant's rights against self-incrimination, his right to trial by a fair and impartial jury, and his rights to due process and equal protection.

(2) Whether the trial court erred in allowing Dr. Harlan, a witness for the prosecution, to testify that, in his opinion, the injury in question was not self-inflicted in violation of defendant's right to trial by a fair and impartial jury and his rights to due process and equal protection.

(3) Whether the trial court erred in restricting counsel for the defendant to eight (8) peremptory challenges in a prosecution for murder in the first degree in violation of defendant's rights to due

process and equal protection and his right to trial by a fair and impartial jury.

(4) Whether the trial court erred in failing to give a complete charge to the jury of all lesser included offenses in a charge of murder in the first degree in violation of defendant's rights to due process and equal protection and his right to trial by a fair and impartial jury.

(5) Whether the evidence offered at trial was insufficient to support the defendant's conviction of murder in the first degree, whether the defendant's subsequent conviction violated his rights to due process and equal protection, and whether his resulting imprisonment therefore constitutes involuntary servitude.

B. PARTIES TO THE PROCEEDING

At trial, Paul G. Summers and Kerry Blackwood with the District Attorney General's Office represented the State of Tennessee. On Appeal, Ann Lacy Johns of the Attorney General's Office represented the State.

At trial and on appeal, James D. Causey and A. Wilson Wages represented the defendant.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Criminal Appeals for the State of Tennessee is not published but is reprinted as Appendix A to this petition. The order of the Supreme Court of Tennessee is not published but is reprinted as Appendix B to this petition.

E. JURISDICTIONAL STATEMENT

(1) The order of the Tennessee Supreme Court was dated and entered November 13, 1984.

(2) A rehearing was not requested, nor has an order been entered granting an extension of time within which to petition for certiorari.

(3) The petitioner anticipates no cross-petition for writ of certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) U. S. Const. Amend. V reprinted as Appendix C

(2) U. S. Const. Amend. VI reprinted as Appendix D

(3) U. S. Const. Amend. XIII, §1 reprinted as Appendix E

(4) U. S. Const. Amend. XIV, §1 reprinted as Appendix F

(5) Tenn. Const. art. I, §9 reprinted as Appendix G

(6) Tennessee Code Annotated §39-2-202 reprinted as Appendix H

(7) Tennessee Code Annotated §39-2-211 reprinted as Appendix I

(8) Tennessee Code Annotated §39-2-221 reprinted as Appendix J

(9) Tennessee Code Annotated §40-18-110 reprinted as Appendix K

(10) Tennessee Rules of Criminal Procedure 24(d) reprinted as Appendix L

G. STATEMENT OF THE CASE

Petitioner (hereinafter referred to as the defendant or Mr. Atkins) married Kimberly Diane Atkins (hereinafter referred to as the decedent or Mrs. Atkins) in June of 1980. The parties separated in June of 1982. On the date in question, the defendant owned a Corvette repair shop located in Millington, Tennessee. The decedent, a Petty Officer Third-Class in the United States Navy, was stationed at the Naval Air Station in Millington, Tennessee.

On October 5, 1982, after leaving work, the decedent stopped by the Going Western Gun Shop in Millington at approximately 3:30 to 3:45 P.M. She allegedly brought her gun, a Walthrup PPKS to the shop for repairs.

At approximately 4:50 P.M. on October 5, 1982, the decedent suffered a gunshot wound to the left chest. The injury occurred in the vicinity of the defendant's

mobile home which was located in a trailer park in Tipton County, Tennessee. The defendant immediately asked his neighbor, Randy Reed, for help. The defendant told Mr. Reed that his wife shot herself. Mr. Reed's wife called an ambulance while Mr. Reed waited with the defendant. The emergency service received the Reeds' call at approximately 4:52 P.M. and arrived on the scene at 5:02 P.M.

The emergency medical technicians called to the scene found Mrs. Atkins slumped in the driver's seat of the defendant's Corvette. Mrs. Atkins died as a result of the gunshot wound.

The technicians found a pistol, a Smith and Wesson Model 39-2, 9 millimeter, in the car seat with the decedent. They also found a wine glass, keys, a purse, a duffel bag and two bottles of wine in the car. When the police arrived, they failed to find a shell casing or the spent fatal

bullet.

At 8:30 P.M., the defendant made a statement to Tennessee Bureau of Investigation Agent Tony Bowers. Mr. Atkins maintained that the decedent came to his house trailer on the afternoon of October 5, 1982. According to Mr. Atkins, he was sitting in his trailer; she walked outside with a Smith and Wesson when he heard a shot. He jumped to the window and, then, ran out the door, first, to try to assist Mrs. Atkins, later to enlist Randy Reed's help.

During the November, 1982 term, the Circuit Court for Tipton County, Tennessee, handed down an indictment for first-degree murder against the defendant. The indictment alleged that the defendant willfully, maliciously, deliberately and pre-meditatedly murdered Kimberly Diane Atkins on October 5, 1982.

On November 1, 1982, the court issued

a capias for the defendant to appear before the circuit court and answer the indictment. The defendant posted a $5,000 bond on November 4, 1982. Prior to trial, counsel for the defendant filed a motion in limine for a hearing to determine the admissibility of certain statements which the State intended to offer. Counsel for the defendant also filed a motion to suppress evidence obtained in a warrantless search of the defendant's automobile, trailer, and surrounding area.

On July 15, 1983, counsel for the defendant filed a motion requesting the court to charge the possible penalties for the offense charged and all lesser included offenses. The court refused to do so and counsel for the defendant assigned the refusal as error on appeal.

Over defense counsel's objection, the trial court limited the defendant to eight (8) peremptory challenges. This error was

assigned in both state appellate courts.

At trial, the State presented the following witnesses in its case in chief:

1. Christen Marie Towery, the decedent's sister, who testified as to the decedent's background;

2. Craig Knox, the decedent's brother, who testified that the defendant made threatening statements against the decedent during the summer of 1982;

3. Howard Jerry and Gail Ellen Murphy Morgan, two emergency medical technicians, who attempted to treat the decedent on October 5, 1982;

4. Dr. Charles Harlan, a medical examiner, who testified as to the cause of death and gave an opinion as to whether the wound was self-inflicted (counsel for the defendant objected to this testimony at trial and assigned as error in both appellate courts the trial court's overruling of the objection);

5. Jeannine Morgan, a co-worker of the decedent, who attempted to testify that the decedent received a threatening phone call on October 5, 1982 at 2:15 to 2:20 P.M. but was not concerned about the call;

6. Robert Curtis Rosenbush, an employee of Going Western Gun Shop, who spoke with the decedent on the afternoon of October 5, 1982, prior to her death;

7. Randy Reed, a neighbor, who the defendant called on for help immediately after Mrs. Atkins suffered the gunshot wound;

8. John Short, an acquaintance of the defendant, who testified that the defendant threatened to kill Mrs. Atkins two weeks prior to October 5, 1982, but admitted he had said the same thing about his wife;

9. Jimmie Anderson, a Sheriff's Deputy, who testified as to the scene where Mrs. Atkins was found;

10. Tony Bowers, a Tennessee Bureau of

Investigation Agent, who took the defendant's statement on October 5, 1982, and who testified on re-direct examination that the defendant refused to take a polygraph test, which testimony prompted a motion for mistrial from counsel for defendant (the trial court refused the motion and refused curative instructions which counsel for defendant assigned as error on appeal);

11. Tommy Heflin, a Tennessee Bureau of Investigation Agent in firearms identification;

12. Dianne Konkoly, a Tennessee Bureau of Investigation Criminologist;

At the close of the State's proof, counsel for the defendant made a motion for acquittal. The trial court denied the motion. Counsel for the defendant later assigned as error on appeal the lack of evidence to support the conviction.

The defense offered three witnesses,

then renewed its motion for acquittal which the trial court denied.

The State based its theory of the case on the Medical Examiner's testimony that the wound was not self-inflicted. In addition, the prosecution emphasized that the defendant and the decedent were separated and the defendant allegedly made threats against the decedent. Finally, the prosecution argued that the defendant was present when the decedent suffered the gunshot wound and he was seen in the vicinity with an object in his hand.

The trial court charged the jury as to first and second degree murder but refused a charge on lesser included offenses.

On July 19, 1983, the trial court entered an order finding the defendant guilty of murder in the first degree. the court sentenced the defendant to life in the state penitenitary and revoked his bond.

Counsel for the defendant timely filed a motion for new trial which the court denied.

Counsel for the defendant then filed a notice of appeal.

Upon submission of briefs and oral argument, the Court of Criminal Appeals at Jackson handed down an opinion affirming the lower court's decision on July 26, 1984.

The Court of Criminal Appeals held that the facts presented at trial supported the jury's finding that the defendant was guilty of first degree murder.

The Court determined that the trial court did not err in permitting Dr. Harlan to give expert testimony to the effect that the gunshot wound was not self-inflicted.

Although the Court of Criminal Appeals noted that it would have been better practice to admonish the jury to disregard testimony to the effect that the defendant

refused to take a polygraph test, the appellate court found the evidence harmless beyond a reasonable doubt.

With respect to procedural issues, the Court of Criminal Appeals held that in prosecution of first-degree murder, where the state does not seek the death penalty, a defendant is entitled to eight (8) peremptory challenges rather than the fifteen (15) peremptory challenges allotted to capital cases under Rule 24(d) of the Tennessee Rules of Criminal Procedure. The Court of Criminal Appeals further determined that the trial jury did not err in failing to charge lesser included offenses.

The defendant timely filed an application for permission to appeal to the Tennessee Supreme Court which was denied by order dated November 13, 1984. By refusing the application, the Tennessee Supreme Court has, for all practical purposes, ratified

the Court of Criminal Appeals' decision.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petitioner respectfully insists that the case before this Court satisfies the requirements of (b) and (c) in the following five respects.

1.

The trial court erred in permitting T.B.I. Agent Bowers to read from a report which stated that the defendant refused to take a polygraph test; furthermore, the court erred in failing to instruct the jury not to consider Agent Bowers' testimony in reference to the defendant's refusal to take the test. This action violated defendant's right against self-incrimination, his right to trial by a fair and impartial jury, and his rights to due process and equal protection.

Under Tennessee law, polygraph test results are inadmissible for any purpose. Nolan v. State, 568 S.W.2d 837, 840 (Tenn. Crim. App. 1978). Moreover, the circumstances accompanying the taking or not

taking of a polygraph test are inadmissible. Hembree v. State, 546 S.W.2d 235 (Tenn. Crim. App. 1976).

The accused's refusal to take a polygraph test is inadmissible not only in Tennessee but also in other jurisdictions surveyed. See, e.g., United States v. Bando, 244 F.2d 833 (2d Cir.), cert. denied, 355 U.S. 844 (1957) (witness testified that defendant refused to take lie detector test; since trial judge sustained objection, no unfavorable inference was created); Bowen v. Eyman, 324 F.Supp. 339 (D. Ariz. 1970) (petition for writ of habeas corpus granted in part because witness for the prosecution testified that defendant refused to take a polygraph test; despite trial court's curative instructions, testimony violated Fifth Amendment and denied petitioner a fair trial and due process); Commonwealth v. Crawford, 468 Pa. 565, 364 A.2d 660 (1976)

(defendant's refusal to take a polygraph examination was irrelevant to issue of guilt but relevant to issue of whether defendant knew he was a suspect in the case; first degree murder conviction reversed on other grounds); State v. Stafford, 213 Kan. 152, 515 P.2d 769 (1973), modified on other grounds and reh'g denied, 213 Kan. 585, 518 P.2d 136 (1973) (it was improper to mention defendant's refusal to take a lie detector test); State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963) (instructions to jury to disregard prosecution's misconduct in referring to defendant's refusal to take lie detector test did not cure error); State v. Emory, 190 Kan. 406, 375 P.2d 585 (1962), cert. denied, 379 U.S. 906 (1964) (reference to defendant's refusal to take lie detector test was prejudicial error denying defendant's substantial rights; conviction reversed); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962) (in spite of prosecution's

contention that statement was volunteered, it was prejudicial error to admit evidence that defendant had been asked if he would be willing to take a lie detector test); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962) (first degree murder conviction was reversed in part due to plain error committed when prosecution referred in opening statement to defendant's refusal to take lie detector test even though the defense did not object to such comment); Mills v. People, 139 Colo. 397, 339 P.2d 998 (1959) (first degree murder conviction reversed because evidence that defendant refused to take a lie detector test was admitted over defendant's objection); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959) (testimony that defendant refused to take a lie detector test was reversible error in conviction of murder, even though testimony was stricken and jury instructed to disregard); People v. Carter, 48 Cal.2d 737, 312 P.2d 665 (1957) (to admit testimony of

suspect to the effect that he had been willing to take a lie detector test was error because it implied that defendant refused and court allowed implication to stand; conviction reversed); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952) (where conviction rested on circumstantial evidence alone, admission of evidence to the effect that the defendant refused a lie detector test was prejudicial error requiring a new trial); State v. Faught, 546 S.W.2d 515 (Mo. App. 1977) (it was prejudicial error to admit testimony that defendant refused to undergo lie detector test; conviction reversed and remanded); Commonwealth v. Williams, 224 Pa. Super. 298, 307 A.2d 289 (1973) (reference to refusal to take polygraph test was inadmissible; however, error was not fundamental nor did it deny accused fair trial because neither the prosecution nor the court

commented on such testimony or made use of it); State v. Hegel, 9 Ohio App. 2d 12, 222 N.E.2d 666 (1964) (admission of testimony to the effect that defendant refused lie detector test was error; where such testimony was first admitted over defendant's objection, and twice thereafter without curative instructions, error was prejudicial and conviction reversed); People v. Banos, 209 Cal. App. 754, 26 Cal. Rptr. 127 (1962) (trial judge conducted voir dire examination of witness outside presence of jury; trial judge correctly instructed prosecution that prosecution witness must omit from his testimony before jury any reference to suggestion that defendant take lie detector test; trial judge offered defense counsel option of pursuing questioning regarding the test on cross-examination which defense counsel declined to do; held no error); Rodriguez v. State, 170 Tex. Crim. App. 295,

340 S.W.2d 61 (1960) (where inexperienced defense counsel questioned defendant concerning lie detector test, state's proof of defendant's refusal to take test was admissible; however, conviction reversed due to defense counsel's inexperience). In the case before this Court, the prosecution called Agent Tony Bowers as a witness for the State. On cross- examination, counsel for the defendant questioned Agent Bowers about the circumstances surrounding a statement allegedly given to the Agent by the defendant and reduced to writing. Counsel for the defendant questioned Agent Bowers about oral statements made by the defendant but omitted from the written statement. In addition, counsel for the defendant questioned Agent Bowers as to whether Bowers made the report contemporaneously with the defendant's interview or whether the report was made from

notes jotted down after the interview with the defendant.

On re-direct examination, the Assistant District Attorney immediately asked that the notes made by Agent Bowers be made an exhibit to his testimony. Counsel for the defendant vigorously objected to any notes being offered into evidence. Counsel for the defendant based his objection on the fact that the notes were not made at the time Agent Bowers talked to the defendant; furthermore, the notes were not part of the res gestae or any statement taken from the defendant. The trial court overruled the defendant's objection and allowed the Assistant District Attorney to continue with his re-direct examination.

The Assistant District Attorney General first asked the Court for permission for Agent Bowers to read the first paragraph of the notes. The court assented. Immediately, the Assistant

District Attorney asked that the whole note be read into the record, which action the court allowed. The second paragraph of the report included the sentence "Subject Atkins later gave a written signed sworn statement but refused to take a polygraph test in reference to the shooting incident until he talked to his lawyer". Counsel for the defendant immediately asked to take the matter up with the court out of the presence of the jury. Counsel for the defendant then renewed his objection on the same basis that it was originally made and, in addition, noted that the statement just read contained highly prejudicial material to the defendant. Counsel for the defendant asked the court to grant a mistrial or, in the alternative, to admonish the jury members that they must not consider the information contained in the statement read into the record by Agent Bowers. The court refused the motion for mistrial and

refused the motion to instruct the jury.

On appeal, the State argued that defense counsel invited the error and was, therefore, precluded from assigning it as error on appeal. This contention is incorrect as a matter of fact and law.

According to Tennessee law, counsel should object to evidence when offered and before admitted. Harless v. State, 198 Tenn. 419, 225 S.W.2d 258, 259 (1949). As a general rule, objections need not be repeated. McCormick v. State, 135 Tenn. 218, 230, 186 S.W. 95 (1916). An objection should be specific; however, if evidence is palpably inadmissible for any purpose, a general objection or any kind or objection may be sufficient. Jones v. State, 184 Tenn. 128, 196 S.W.2d 491, 492 (1946). Tennessee appellate cases fall into four (4) categories with respect to treatment of alleged error at the trial level in admitting inadmissible evidence. The first

line of decision involves cases where no objection was made at all or the objection to inadmissible evidence was not made timely. See, e.g., Sturgis v. State, 199 Tenn. 558, 288 S.W.2d 434, 436-37 (1956); Turner v. State, 188 Tenn. 312, 219 S.W.2d 188, 193 (1949). In the second category, the trial court sustained objection to improper questioning. See, e.g., Bunch v. State, 3 Tenn. Crim. App. 481, 463 S.W.2d 956, 958 (1970). Under the third line of decisions, the trial court gave curative instructions. See, e.g., Anderson v. State, 512 S.W.2d 665, 669-72 (Tenn. Crim. App. 1974). In the fourth line of cases, admission of inadmissible evidence constituted grounds for reversal. See, e.g., Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950).

In the case before this Court, the defendant's refusal to take a polygraph test was evidence inadmissible for any

purpose. In the majority of jurisdictions surveyed, this action clearly would constitute prejudicial, reversible error.

Counsel for the defense made an objection prior to entry of the evidence into the record, and immediately upon entry moved for a mistrial or instructions. In view of the trial court's refusal to issue curative instructions, defense counsel's renewal of the objection prior to entry would have been futile. Since objection was timely made and the trial court overruled the objection and refused to issue curative instructions, the Court of Criminal Appeals' decision conflicts with decisions rendered in numerous other jurisdictions.

2.

The trial court erred in allowing Dr. Harlan to testify that, in his opinion, the injury in question was not self-inflicted. This action violated defendant's right to

trial by a fair and impartial jury and his rights to due process and equal protection.

At trial, the circuit court allowed Dr. Harlan not only to testify about the autopsy performed on the decedent, but also allowed the Medical Examiner to give an opinion about whether the wound was self-inflicted or not. In its opinion dated July 26, 1984, the Court of Criminal Appeals relied on the case of City of Columbia v. C.F.W. Construction Company, 557 S.W.2d 734, 741-42 (Tenn. 1977) for the proposition that Dr. Harlan's expert opinion testimony was admissible to establish the ultimate fact to be reached by the jury. The City of Columbia case, however, was a civil proceeding rather than a criminal prosecution.

Prior to the City of Columbia decision, the Tennessee Supreme Court outlined two requisites for the admission

of expert testimony - (1) the subject under examination must be one which requires knowledge or experience not possessed by laymen; and (2) the expert must possess this knowledge or experience. Casone v. State, 193 Tenn. 303, 246 S.W.2d 22, 26-27 (1952). With respect to wounds in criminal cases, the Tennessee Supreme Court had previously held that the admission of testimony to the effect that a would could not have been self-inflicted was error because the testimony addressed the ultimate fact to be reached by the jury. McCravy v. State, 133 Tenn. 358, 181 S.W. 165 (1915). The Tennessee Supreme Court had also determined that such evidence is incompetent, if not prejudicial. Moon v. State, 146 Tenn. 319, 242 S.W.2d 39 (1921).

In contrast, in the later case of Bryant v. State, 539 S.W.2d 816, 819 (Tenn. Crim. App. 1976), the Court of Criminal Appeals held that a doctor's opinion was

factually based and, consequently, admissible. The doctor in Bryant testified as to the location of entry and exit wounds and the angle of the wound. The doctor could not say that the wound was not self-inflicted.

Whether an expert witness can give an opinion upon an ultimate fact in issue varies from jurisdiction to jurisdiction. In some courts, an expert's opinion on the ultimate fact in issue improperly invades the province of the jury.[1] Some courts hold that the opinion is admissible if couched in terms which are not firm or

1. See, e.g., Webb v. Commonwealth, 204 Va. 24, 129 S.E.2d 22 (1963) (expert opinion testimony should have been excluded where expert witness testified that two deposit slips prepared by employee charged with embezzlement indicated a shortage and that unrecorded receipts were used to replace funds); Ramsey v. Commonwealth, 200 Va. 245, 105 S.E.2d 155 (1958) (case reversed and remanded where expert witness testified that fire was incendiary); State v. Molinar, 24 Conn. Supp. 160, 188 A.2d 69 (1962) (exclusion of question held proper

absolute.[2]

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where question was designed to elicit police officer's opinion as to whether defendant was travelling at an unreasonable speed in a prosecution for speeding).

2. See, e.g., State v. Martinez, 52 N.M. 343, 198 P.2d 256 (1948) (fire arms expert's testimony was held improper where he testified in murder prosecution that the fatal bullet was fired from defendant's gun; doctor's testimony to the effect that in his opinion the deceased died from a gunshot wound held admissible); Braley v. State, 54 Okla. Crim. 219, 18 P.2d 281 (1932) (although expert witness should have merely expressed an opinion as to identity of fingerprint, his positive identification was held harmless error); State v. Campbell, 213 Iowa 677, 239 N.W. 715 (1931) (ballistic expert's testimony that two bullets in question passed through same barrel held admissible); Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929) (firearms expert permitted to give an opinion by testifying that bullet in evidence was fired from pistol in evidence; expert illustrated tool marks on different pistols by blackboard drawings so as to permit identification of bullets fired from different weapons); State v. Beaudin, 76 Wash. 306, 136 P. 137 (1913) (in prosecution for sodomy, state's witness was allowed to testify that the condition of the child's person might have resulted from acts constituting the crime; trial court erroneously excluded defense witness' testimony that other causes could have produced the condition); Costello v. State, 176 Ala. 1, 50 So. 202 (1912) (physician allowed to testify in a homicide case that wounds found on decedent were

The modern trend allows the opinion in evidence.[3]

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caused by falling against dresser but physician also testified that he hated to say whether it was probable that the wounds were so caused); Copeland v. State, 58 Fla. 25, 50 So. 621 (1909) (physician was allowed to testify as to symptoms of strychnine poisoning and that the decedent's condition could have resulted from strychnine poisoning); People v. Lang, 142 Cal. 482, 76 P. 232 (1904) (witness allowed to testify that same person wrote two exhibits); Davis v. State, 38 Md. 15 (1873) (examining physician was competent to testify in murder trial as to the kind of instrument in his opinion that could have inflicted the wounds; second physician was competent to testify whether wounds could have been caused by accidental fall).

3. See, e.g., State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963) (court permitted medical doctor to testify as to results of medical tests and examinations in prosecution for rape); State v. Ward, 10 Utah 34, 347 P.2d 865 (1959) (doctor's testimony that prosecutrix had been subjected to forcible sexual assault was held admissible); State v. Paglino, 319 S.W.2d 613 (Mo. 1958) (expert testimony to the effect that some highly flammable substance, such as gasoline, was present and that fire was incendiary in origin was admissible); State v. Fox, 248 Iowa 1394, 85 N.W.2d 608 (1957) (physician who examined defendant after arrest for operating a vehicle while intoxicated was properly permitted to testify that a person with a urine alcohol concentration of 330 milligrams per 100 cc. of urine was intoxicated in his opinion); Newton v.

Even under the third line of cases, admission of Dr. Harlan's testimony constituted reversible error in the case before this Court. Dr. Harlan did not qualify as a firearms expert, but yet testified as such.

Richard, 198 Va. 869, 96 S.E.2d 775 (1957) (motion to exclude toxicologist's findings in prosecution for operating an automobile under the influence of intoxicants should have been granted because blood analyzed was not sufficiently identified; upon reversal and remand, court prohibited toxicologist's comment giving opinion upon the accused's fitness to operate an automobile); People v. Maas, 145 Cal. App.2d 69, 301 P.2d 894 (1956) (testimony by experts that fire was of incendiary origin was properly admitted); People v. Cole, 47 Cal.2d 99, 301 P.2d 854 (1956) (examining pathologist was allowed to give opinion as to whether wound could have been self-inflicted in first degree murder prosecution); State v. Viola, 51 Ohio L. Abs. 577, 82 N.E.2d 306 (1947), appeal dismissed, 148 Ohio St. 712, 76 N.E.2d 715 (1947), cert. denied, 334 U.S. 816 (1948) (expert witness allowed to testify that fingerprint on state's exhibit matched defendant's finger); State v. Johnson, 37 N.M. 280, 21 P.2d 813 (1933) (a statement by a fingerprint expert that fingerprints on exhibit belonged to accused held not error); State v. Kuhl, 42 Nev. 185, 175 P. 190 (1918) (evidence of experts as to identity of palm prints held admissible in murder prosecution); People v. MacGregor, 178 Mich. 437, 144 N.W. 869 (1914) (doctors permitted to give opinion in murder case that the cause of death was arsenic poisoning); People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911) (expert witness allowed to

The jury in the instant case had before it evidence sufficient to determine whether or not the wound was self-inflicted, i.e., the entry and exit points of the bullet, its path and angle, the presence of stippling, and the deceased's right-handedness. Introduction of Dr. Harlan's opinion testimony invaded the province of the jury. The case before this Court offers the opportunity to define the limits of expert testimony when that testimony goes beyond the witness' expertise.

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testify that two sets of fingerprints were made by the same person); Urga v. State, 155 So.2d 719 (Fla. App. 1963), cert. denied, 379 U.S. 829 (1964), reh'g denied, 379 U.S. 924 (1964) (testimony of doctor in prosecution for performing certain acts with intent to procure a miscarriage held admissible where doctor testified that his personal examination of prosecuting witness disclosed excessive bleeding, infection and expansion indicating recent pregnancy and that in his opinion an abortion had been induced); Wilbanks v. State, 42 Ala. App. 39, 151 So.2d 741 (1962), cert. denied, 275 Ala. 701, 151 So.2d 744 (1963) (testimony of doctor as to path of flight of bullet which killed alleged murder victim held admissible; case reversed on other grounds). See also Rule 704 of the Federal Rules of Evidence.

3.

The trial court erred in restricting the defendant to eight (8) peremptory challenges in its prosecution for murder in the first degree. This action violated defendant's rights to due process and equal protection and his right to trial by a fair and impartial jury.

According to Rule 24(d) of the Tennessee Rules of Criminal Procedure:

> "If the offense charged is punishable by death, each defendant is entitled to fifteen (15) peremptory challenges and the State is entitled to eight (8) peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight (8) peremptory challenges and the state is entitled to four (4) peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three (3) peremptory challenges for each defendant."

A literal reading of the first

sentence of Rule 24(d) indicates that if the offense charged is first degree murder, the defendant is entitled to fifteen (15) peremptory challenges. In the case before this Court, the Court of Criminal Appeals relied on several unreported decisions for the proposition that a defendant is entitled to only eight (8) peremptory challenges in a capital case when the State does not ask for the death penalty. State v. John L. Bates, No. 813, filed at Knoxville, July 13, 1983, unreported; State v. David Carney, No. 81-25A-III, filed at Nashville, August 19, 1982, unreported; State v. Joseph Maurice Walker, No. 80-225-III, filed at Nashville, June 18, 1981, unreported. The Court also relied on two reported decisions, Cheairs v. State, 543 S.W.2d 70 (Tenn. Crim. App. 1976); Jenkins v. State, 509 S.W.2d 240 (Tenn. Crim. App. 1974).

The Cheairs and Jenkins decisions

rested on extraordinary circumstances, that is, Tennessee's death penalty statute had been held unconstitutional. In two previously reported decisions, Fowler v. State, 67 Tenn. (8 Bax.) 573 (1876) and Hooper v. State, 13 Tenn. (5 Yer.) 422 (1826), the Tennessee Supreme Court reversed the convictions because the trial courts erroneously limited the defendants' peremptory challenges. In Fowler, the trial court limited a defendant charged with feloniously breaking and entering a dwelling to ten (10) peremptory challenges. Because the offense was punishable by death, the Tennessee Supreme Court held that the defendant was entitled to twenty-four challenges.

In Hooper, the trial court limited a defendant charged with perjury to twelve (12) challenges. A statute allowed thirty-five (35) challenges in capital cases. The Tennessee Supreme Court reversed

a judgment of conviction, noting that perjury was a felony by statute and punishable with death on a second offense.

The case law on the appropriate number of peremptory challenges in capital cases is in conflict in other jurisdictions. For example, in Batten v. State, 533 S.W.2d 788 (Tex. Crim. App. 1976), the trial court limited a defendant charged with capital murder to ten (10) peremptory challenges. Although the prosecution had indicated that it would not seek the death penalty at trial, the Court of Criminal Appeals of Texas reversed the conviction based upon its conclusion that the category of the case, not the nature of the punishment, determined the number of peremptory challenges. Accord Kerley v. State, 89 Tex. Crim. App. 199, 230 S.W. 163 (1921), and Tillman v. State, 251 Ark. 529, 475 S.W.2d 529 (1972); but cf. People v. Holmes, 19 Ill. App.3d 814, 313 N.E.2d 297 (1974) and

United States v. Maestas, 523 F.2d 316 (2d Cir. 1975) (interpreting Rule 24(b) of the Federal Rules of Criminal Procedure).

The instant case presents the Supreme Court with the opportunity to settle an important question of law because various holdings by Tennessee courts conflict. In addition, holdings in other jurisdictions conflict.

4.

The trial court erred in its failure to give a complete charge to the jury of all lesser included offenses in the charge of murder in the first degree. This action violated defendant's rights to due process and equal protection and his right to trial by a fair and impartial jury.

Tennessee Code Annotated §40-18-110(a) provides:

> "It shall be the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two or more grades or classes of the defenses may be included in

> the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so."

In the case before this Court, the trial court included in its charge first and second degree murder, Tennessee Code Annotated §§39-2-202 and 39-2-211, but not manslaughter, Tennessee Code Annotated §39-2-221.

There is a split of opinion among the federal circuit jurisdictions as to whether manslaughter is a lesser included offense of murder. In the following cases, the courts held manslaughter to be a lesser included offense of murder: United States v. Thompson, 492 F.2d 359 (8th Cir. 1974); United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970); United States v. Barbeau, 92 F.Supp. 196 (D.C. Alaska 1950) aff'd, 193 F.2d 945 (9th Cir. 19510, cert. denied, 343 U.S. 968 (1952).

In the following cases, the courts

determined that manslaughter was not a lesser included offense: United States v. Manuel, 706 F.2d 908 (9th Cir. 1983); Belton v. United States, 382 F.2d 150 (D.C. Cir. 1967).

The underlying circumstances in the Comer decision are analogous to the case before this Court. In Comer, a deceased wife bled to death from a stab wound in her left thigh. A jury found her husband guilty of second degree murder. The Court of Appeals for the District of Columbia reversed the conviction for failure to grant instructions on manslaughter. The Government's case against the defendant was entirely circumstantial. The element to be proven in second degree murder but not manslaughter was malice. Not only had the Government relied upon circumstantial evidence to infer malice, but it also relied on circumstantial evidence to infer that the defendant inflicted the wound. The defendant's theory was that he did not commit the act. Id. at 1154-55

(cited with approval in Keeble v. United States, 412 U.S. 205, 208 n. 7 (1973).

The trial court in the instant case gave instructions on first and second degree murder but failed to include manslaughter. In upholding the trial court's action, the Court of Criminal Appeals held that in this case the defendant introduced no evidence to contradict the State's evidence; moreover, the jury found the defendant guilty of "willful, deliberate, malicious and premeditated killing" by finding him guilty of first degree rather than second degree murder.

If permitted to stand, the Court of Criminal Appeals' decision will erode a basic tenant of our criminal justice system; that is, a defendant is considered innocent until proven guilty. In a criminal prosecution, the State must prove guilt beyond a reasonable doubt. By using hindsight to justify the charge to the jury

in the case at bar, the Court of Criminal Appeals neglected the prejudicial influence of an incomplete charge on a jury's deliberations. If permitted to stand, the decision conflicts with various decisions rendered by federal courts of appeal, particularly the Comer decision.

5.

The evidence offered at trial was insufficient to support the defendant's conviction of murder in the first degree. Defendant's subsequent conviction violated his rights to due process and equal protection and, therefore, his resulting imprisonment constitutes involuntary servitude.

Tennessee Code Annotated §39-2-202 defines first degree murder as follows:

> "39-2-202 - First degree murder. (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder

in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging with destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

(c) Murder in the first degree is a Class X felony.

The prosecution in the case before this Court offered virtually no direct evidence that a crime was committed. The State produced no witnesses who saw the defendant shoot the decedent. The defendant did not confess to shooting the decedent. The defendant did not flee after the shooting nor did he attempt any coverup. The prosecution merely offered circumstantial evidence - the parties' separation; alleged threats against the decedent, one of which was inadmissible in evidence, one of which was remote in time, and one of which was made in jest; opinion

evidence of the medical examiner; the defendant's presence at the scene of the injury. In order to convict on circumstantial evidence under Tennessee law, the circumstances must exclude every hypothesis other than guilt. Crouch v. State, 498 S.W.2d 97, 99 (Tenn. 1973). The evidence offered by the State at trial wholly failed to establish willful, deliberate, malicious, or premeditated billing. At most, the jury inferred malice based upon circumstantial evidence. See United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970), discussed supra.

Coupled with the State's failure to establish the elements of first degree murder, was the prosecution grounded on circumstance alone. With the failure to grant the statutorily allotted number of peremptory challenges and with admission of the highly prejudicial testimony of Tennessee Bureau of Investigation Agent Bowers and Dr. Harlan, the trial court permitted an atmosphere to develop during the trial which denied the petitioner rights secured by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. His resulting imprisonment violates the Thirteenth Amendment to the United States Constitution.

For the foregoing reasons, the defendant respectfully requests this Court to grant his petition in this cause for a Writ of Certiorari to the Supreme Court of Tennessee to hear and decide his case on oral argument and briefs.

Respectfully submitted,

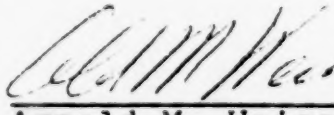


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January, 1985.

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 9 day of January, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon Ann Lacy Johns, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, and Paul G. Summers, District Attorney General, State of Tennessee, 16th Judicial Circuit, 302 Market Street, Somerville, Tennessee 38068, copies of the foregoing Petition for Writ of Certiorari filed by Jackie Lee Atkins, by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.



Arnold M. Weiss